

ORIGINAL

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
 )  
Inquiry Concerning the Deployment of )  
Advanced Telecommunications )  
Capability to All Americans in a Reasonable ) CC Docket 98-146  
and Timely Fashion, and Possible Steps )  
to Accelerate Such Deployment )  
Pursuant to Section 706 of the )  
Telecommunications Act of 1996 )

**Reply Comments of Network Plus, Inc.**

Network Plus, Inc. ("Network Plus") respectfully submits the following reply comments in response to the Notice of Inquiry ("NOI") issued in the above-captioned proceeding.<sup>1</sup> In these reply comments, Network Plus adds its support to various commenters' suggestions that CLEC access to unbundled dark fiber is essential to their deployment of advanced services.

**I. Numerous Commentors Submitted Evidence that Competition and Market Forces Will Ensure the Deployment of ATC So Long As Competitors Have Access to ILECs' Bottleneck Local Networks**

Section 706 of the Telecommunications Act of 1996 ("1996 Act") requires the FCC to initiate a NOI concerning the availability of advanced telecommunications capability ("ATC") and to determine whether ATC is being deployed to all Americans in a reasonable and timely fashion. Numerous competitive carriers, including Network Plus, and other service providers (e.g., cable companies) submitted initial comments in this proceeding showing that they are offering, or plan to

---

<sup>1</sup> *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Notice of Inquiry, FCC 98-187 (rel. Aug. 7, 1998) ("NOI").

offer, ATC to consumers. *See, e.g.*, AT&T Corp. at 14-15, 18-23; DSL Access Telecommunications Alliance ("DATA") at 4; Intermedia Communications, Inc. at 11; Qwest Communications Corporation at 10-13; Time Warner Cable at 4; Williams Communications, Inc. at 4.

However, in their initial comments, competitive carriers also showed that their ability to provide advanced services, such as xDSL, depends on nondiscriminatory access to clean, unbundled incumbent local exchange carrier ("ILEC") local loops and the ability to collocate at ILEC premises. *See, e.g.*, AT&T at 6-7, 43; Intermedia at 13; MCI Communications/WorldCom, Inc. at 3; Qwest at 23-24. Furthermore, unless access to unbundled loops and physical collocation is provided at incremental cost-based rates, the ILEC will always be able to use its monopoly over the bottleneck local loop to underprice its competitors. *See, e.g.*, DATA at 18 (disparity between rates charged by ILECs for wholesale inputs and retail prices charged to consumers acts as price squeeze on CLECs); Northpoint Communications, Inc. at 6 (FCC should require ILECs to impute loop and collocation costs in their ADSL tariffs). The FCC can and should address these barriers to the deployment of ATC in its *Advanced Services NPRM*.<sup>2</sup>

## **II. The FCC Should Establish a Record Necessary to Show that Dark Fiber is a Network Element that ILECs Must Unbundle**

In their initial comments, both Qwest and Allegiance Telecom, Inc. recommended that the FCC require ILECs to provide dark fiber to CLECs on an unbundled basis. Qwest at 23; Allegiance

---

<sup>2</sup> *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Notice of Proposed Rulemaking, FCC 98-188 (rel. Aug. 7, 1998) ("*Advanced Services NPRM*").

at 4-6. Network Plus strongly supports these recommendations; indeed, Network Plus made a similar recommendation in its comments on the FCC's *Advanced Services NPRM*. Network Plus intends to serve the work-at-home and 3 to 5 line small business markets. Although Network Plus is installing its own fiber, without access to ILEC dark fiber, it could take years for Network Plus to build out into the suburban and residential neighborhoods where these customers are located. While some competitive providers have built or are installing dark fiber to ILEC central offices, the ILECs still control the majority of such dark fiber.

In its *Local Competition Order*, the FCC determined that it did not have a sufficient record before it to determine whether dark fiber qualified as a network element.<sup>3</sup> However, many state public utilities commissions, in the context of arbitrating interconnection disputes between ILECs and CLECs, have found that dark fiber is a network element that must be unbundled. (See, e.g., decisions listed in Attachment A.) At least three federal district courts reviewing interconnection agreements have also agreed that dark fiber is a network element. *MCI v. BellSouth Telecommunications*, 7 F.Supp.2d 674 (E.D.N.C. 1998) (finding dark fiber is a network element and remanding to Commission to determine whether BellSouth's failure to provide MCI access to dark fiber would impair MCI's ability to provide services it seeks to offer); *MCIMetro Access*

---

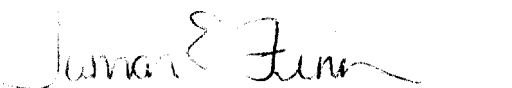
<sup>3</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶450 (1996) ("*Local Competition Order*"), vacated in part and aff'd in part sub nom. *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), cert. granted sub nom. *AT&T Corp. v. Iowa Utils. Bd.*, 118 S. Ct. 879 (1998).

*Transmission Services, Inc. v. GTE Northwest, Inc.*, No. C97-9058WD, slip op. (W.D. Wash. July 7, 1998) ("WUTC properly determined that 'dark fiber' is a network element under 47 U.S.C. § 251(c)(3)"); *Southwestern Bell Telephone Company v. AT&T Communications of the Southwest, Inc.*, No. A 97-CA-132 SS, Order at 11-14 (W.D. Tex. Aug. 31, 1998). In rejecting the North Carolina Commission's determination that dark fiber was not a network element, Judge Britt reasoned that:

[m]ost persuasive is the general tenor of the Eighth circuit decision in Iowa Utilities. That decision expanded the definition of network elements to include non-physical elements. If non-physical elements are brought under the definition, it seems only logical that an expansion to a true physical element which may not have been explicitly contemplated by Congress is more than warranted.

*MCI v. BellSouth*, 7 F.Supp.2d at 680. Network Plus urges the FCC to use the *Advanced Services NPRM* docket to establish a record that shows dark fiber is a network element that ILECs must provide to CLECs on an unbundled basis.

Respectfully submitted,



Andrew D. Lipman  
Tamar E. Finn  
Swidler Berlin Shereff Friedman, LLP  
3000 K Street, N.W. Suite 300  
Washington, DC 20007  
Counsel for Network Plus, Inc.

October 8, 1998

*Reply Comments of Network Plus, Inc.  
CC Docket 98-146, Oct. 8, 1998*

## **Attachment A**

In re Petition by AT&T Communications of the South Central States, Inc., for Arbitration of Certain Terms and Conditions of a Proposed Agreement with GTE Alabama, Inc., Docket No. 25704, Arbitration Report and Recommendation at 42 (Ala. Pub. Serv. Comm'n Jan. 31, 1997) ("Dark fiber clearly is a network element");

Re MCI Telecommunications Corp., 1996 WL 773337, \*49 (Ga. P.S.C. Dec. 17, 1996) (Docket No. 6865-U) (dark fiber is a network element);

Re New England Telephone and Telegraph Company dba NYNEX, 1996 WL 773739, \*24-25 (Mass. D.P.U., Dec. 4, 1996) (Docket Nos. D.P.U. 96-73, 96-74, 96-80, 96-75, 96-81, 96-83, 96-94 Phase 3) (dark fiber is a network element);

AT&T Communications of Michigan, Inc.'s Petition for Arbitration of Interconnection Terms, Conditions and Prices from GTE, Notice of Decision of Arbitration Panel at 48-49 (Mich. Pub. Serv. Comm'n Nov. 12, 1996) ("AT&T should have access to GTE's unused transmission media ('dark fiber')."), aff'd, In re the Petition of AT&T Communications of Michigan for Arbitration to Establish an Interconnection Agreement with GTE North. Order Approving Agreement Adopted by Arbitration at 3 (Dec. 12, 1996);

In re Consolidated Petition of AT&T Communications of the Midwest, et al. for Arbitration with US West Communications, Docket No. P-422, 421/M-96-855, Order Resolving Arbitration Issues and Initiating a US West Cost Proceeding at 23 (Minn. P.U.C. Dec. 2, 1996) (dark fiber must be unbundled and offered as a network element);

In re the Petition of AT&T Communications of the Mountain States, Inc. Pursuant to 47 U.S.C. Section 252(b) for Arbitration of Rates, Terms, and Conditions of Interconnection with US West Communications, Inc., Docket No. D96.11.200, Order No. 5961b, Arbitration Decision and Order at 33 (Mont. Pub. Serv. Comm'n Mar. 20, 1997) ("U S West must provide access to its dark fiber as an unbundled network element);

AT&T Communications' Petition for Arbitration of Interconnection Terms, Conditions and Prices from U S West, Preliminary Decision on Issues for Arbitration of Interconnection Agreement between U S West and AT&T in the State of Neb. At 19 (Neb. Pub. Serv. Comm'n Dec. 12, 1996) (dark fiber is a network element and must be unbundled);

In re the Interconnection Contract between AT&T Communications of the Mountain States, Inc. and U S West Communications, Inc. Pursuant to 47 U.S.C. Section 252, Docket No. 96-411-TC, Findings of Fact, Conclusions of Law and Order at 45 (N.M. State Corp. Comm'n Mar. 20, 1997) ("US West must provide dark fiber as an unbundled network element.");

AT&T Communication of the Midwest, Inc. Interconnection Arbitration Application, Case No. PU-453-96-497, Arbitrator's Decision at 28 (N.D. Pub. Serv. Comm'n Mar. 19, 1997) (U S West must unbundle dark fiber);

In re MCI Telecommunications Corp., 1997 WL 120999, \*3 (Ohio P.U.C., Feb. 20, 1997) (Docket No. 96-888-TP-ARB) (dark fiber is network element and the failure to provide access would impair MCI's ability to provide services);

In re the Petition of AT&T Communications of the Pacific Northwest, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions with GTE Northwest, Inc., Arbitrator's Decision at 16 (Or. P.U.C. Dec. 12, 1996) ("GTE must make dark fiber available on an unbundled basis"), aff'd, Commission Decision at 2 (Jan. 13, 1997);

In re Petition of AT&T Communications of the Southern States, Inc., for Arbitration of an Interconnection Agreement with BellSouth Telecomm., Inc., Docket No. 96-358-C, Order No. 97-189, Order on Arbitration at 13 (S.C. Pub. Serv. Comm'n Mar. 10, 1997) ("[D]ark fiber is a network element because it is a facility or equipment used in the provision of a telecommunications service.");

MCI Telecommunications Corp., 1997 WL 182585, \*36 (Tenn. R.A., March 7, 1997) (Docket No. 96-01271) (dark fiber is a network element).

In re the Petition of Arbitration of an Interconnection Agreement Between AT&T Communications of the Pacific Northwest, Inc. and GTE Northwest, Inc., Arbitrators's Report and Decision at 37 (Wash. Utils. & Transp. Comm'n Dec. 11, 1996) at 37 ("GTE must offer dark fiber as a network element");

Petition for AT&T Communications of Wisconsin for Arbitration to Establish an Interconnection Agreement with GTE North Inc., Decision of the Arbitration Panel at 51 (Wisc. Pub. Serv. Comm'n Dec. 12, 1996) (dark fiber is a network element).


**CERTIFICATE OF SERVICE**

I, Wendy Mills, hereby certify that I have on this 8th day of October, 1998, served copies of the foregoing Reply Comments of Network Plus, Inc. on the following via hand delivery:

Magalie Roman Salas, Esq. (orig. + 9)  
Secretary  
Federal Communication Commission  
1919 M Street, NW  
Room 222  
Washington, DC 20554

Janice Myles (1 + disk)  
Common Carrier Bureau  
Federal Communications Commission  
1919 M Street, NW  
Room 544  
Washington, DC 20554

ITS (1 + disk)  
1231 19<sup>th</sup> Street, N.W.  
Washington, DC 20554

  
\_\_\_\_\_  
Wendy Mills